Supreme Court, U.S.
FILED
081336 MAR 6 - 2009
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No. 10

In the Supreme Court of the United States

HAROLD GLENN LINVILLE JR.,
Petitioner,

v.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

If the State and Defendant agree that Whitten v. State, 690 N.W.2d 561 (Minn. App. 2005) (conviction for felon-in-possession vacated where defendant's previous probation discharge order restored defendant to all civil rights and left blank the prohibition against firearm possession) directly applies to warrant a dismissal of a charge of felon in possession of a firearm, does the fact of arraignment in the dismissed case then negate the application of Whitten in a future case on the same charge?

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CITATIONS OF OPINIONS AND ORDERS

1. State of Minnesota vs. Harlod Glenn Linville, Jr. Dakota County District Court, Case Number # K9-07-1667 (Sept. 4, 2007).

2. State of Minnesota vs. Harold Glenn Linville, Jr. State v. Linville, 755 N.W.2d 314 (Minn. Ct. App. 2008).

BASIS FOR JURISDICTION OF THIS COURT

Motion to dismiss forwarded to the trial court on August 15, 2007. Motion denied by the trial court on September 4, 2007. Question certified as "important and doubtful" by the trial court on October 26, 2007. Minnesota Court of Appeals certified question in the affirmative on September 2, 2008, ruling against the petitioner Linville. Application for certiorari to the Minnesota Supreme Court for further review filed October 1, 2008. Petition for further review denied by the Minnesota Supreme Court, entry of judgment December 8, 2008.

A case of judicial entrapment rarely passed on, involving issues of separation of powers and due process. The United States Supreme Court recognized that the government violates an individual's due-process rights when representatives of the state mislead individuals as to their legal obligations. Raley v. Ohio, 360 U.S. 423, 439, 79 S. Ct. 1257, 1267, 3 L. Ed. 2d 1344 (1959). The due process clause of the Minnesota Constitution provides:

Sec. 7. Due process . . . . No person shall be held to answer for a criminal offense without due process of law, and no person shall . . . be deprived of life, liberty or property without due process of law . . .

Minn. Const. Art. I, § 7. The Minnesota provision parallels the federal constitutional provision. See U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In this case, defendant was charged in May of 2007 with Possession of a Pistol by an Ineligible Person under Minn. Stat. § 624.713, subd. 1(b); subd. 2(b); 609.11, subd. 5(b); 609.101. In December of 2006, defendant had previously been charged with the same offense in Dakota County Court File K6-06-3995. In April of 2007 (a month before the second charge) defendant moved to dismiss the first charge on the basis of State v. Amos, 2003 Minn. App. LEXIS 1100, No. CX-03-42, 2003 WL 22040016 (Minn. App. Sept. 2, 2003); a case in accord with Whitten. In September of 2007, while defendant's motion was still under judicial advisement (and both cases were then pending), the State dismissed its first prosecution on the basis of Whitten.

However, the State argues that Whitten does not bar conviction in the second case because defendants are limited to one dismissal under Whitten at least where they were previously arraigned on a charge the State later dismissed as erroneous. The district court agreed, holding that arraignment in the erroneous first prosecution provided Appellant "appropriate notice" that he should not possess firearms as alleged in the instant prosecution.

The Minnesota Court of Appeals answered the certified question in the affirmative, and affirmed the district court's denial of defendant's motion to dismiss. State v. Linville, 755 N.W.2d 314 (Minn. App. 2008). The Court of Appeals based its ruling on the conclusion that Whitten required reconciliation in

light of its earlier decision in State v. Grillo, 661 N.W.2d 641, 645 (Minn. App. 2003), review denied (Minn. 5 Aug. 2003). A petition for further review was denied by the Minnesota Supreme Court, entry of judgment December 8, 2008.

REASONS FOR GRANTING REVIEW

Both parties agree that Whitten applied to dismiss the State's first prosecution. At no time did the State or trial court cite any case law or other authority as to why Whitten would not apply to the second prosecution. Yet, the Court of Appeals now holds that it is Grillo which limits the scope of Whitten. Yet, the Whitten court has already informed us to the contrary:

> The Grillo decision stated that a claim of ignorance of the law is not an acceptable defense. *Id.* However, Grillo differs from the instant case. Here, the state not only failed to communicate the prohibition (as in Grillo), but **told appellant he would be eligible to own a firearm**. The statute does not cover this type of situation. See Minn. Stat. § 624.713, subd. 3.

Whitten, at 565-66. (emphasis added). To its credit, the State, upon inquiry at oral argument, agreed that the Grillo scenario (a no-communication situation results in no remedy by virtue of Minn. Stat. § 624.713, subd. 3) is not applicable here.

As such, we can see two distinct lines of cases. One where the defendant receives no communication (Grillo), and one where a (purportedly false) communication is made to him (Whitten). Clearly, the instant case is the latter because the

communication was made. Indeed, we need only resort to the trial court's certified question, or the parties' "Agreed upon Statement as the Record" to know that Whitten applied here. As such, if we are now to resort back to Grillo for the second case, then we should be able to point to a valid reason why the (purportedly erroneous[1]) communication has been taken away.

The answer provided by the lower appellate court is that, "at no time after the (unlawful charge/arraignment) did the state communicate to appellant that he was eligible to possess firearms." State v. Linville, 755 N.W.2d 314 (Minn. App. 2008). The end result is that the State's admittedly erroneous charging removed the communication in the trial court's order dated June 14, 2006 that was the very reason for the prosecution being erroneous under Whitten. This is difficult to follow.

In looking at the dismissed complaint given to defendant at his arraignment, there is no mention of a discharge order. If there had been, perhaps the Court would not even have arraigned defendant. Contrary to the lower courts' holdings, the arraignment did not erase the judicial decision of June 14, 2006. Whatever arguments might be made about an arraignment in an erroneous prosecution, it does not negate a court order, or defend away the "most indefensible sort of entrapment." Whitten, at

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[1] The State and the lower court refer to the discharge order as "erroneous" but neither the judge nor district court has ever been consulted as to whether it was in fact a clerical error (as occurred in Whitten). As such, the law is now that the State can refuse to honor a court order so long as they personally believe the order is wrong.

565 (quoting Raley v. Ohio, 360 U.S. 423, 438, 79 S. Ct. 1257, 1266, 3 L. Ed. 2d 1344 (1959)).

Whitten held that "[b]ecause the district court order effectively advised appellant that he had the right to possess firearms, the Due Process Clause of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution prohibit his conviction." Id. at 566. Now, the effect of the lower published decision here is that the State can prosecute a citizen erroneously in order to eviscerate the very district court order that would have prevented the conviction under Whitten. This is an alarming result from a separation of powers standpoint, since "[n]o person or persons belonging to or constituting one of the (three branches) shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." State vs. S.L.H., 755 N.W.2d 271 (Minn. 2008) (quoting Minn. Const. art. III, § 1).

As a practical matter, too, the State of Minnesota has many choices in prosecuting defendants of this type. It can train law enforcement to gain evidence designed at disproving reliance upon any previous discharge orders concerning eligibility for firearm possession. It can review discharge orders before it prosecutes these cases. It can move the court to modify those discharge orders it believes to be erroneous. None of this occurred.

As such, it is the defense attorney who is charged with the duty of advising his client that a barred prosecution confidently moved to be dismissed in April, means that a conviction will result on the identical offense in May, when nothing about the court's discharge order had expired, been appealed, or

otherwise been modified or vacated in any way, at any time. Indeed, it has been said that "when entrapment has been caused by a judicial opinion, the argument in favor of recognizing (a remedy) is even more compelling, since courts are the very entities charged with interpreting the law. Kratz v. Kratz, 477 F.Supp. 463, 482 (D.C. Pa. 1979).

There are, in all likelihood, hundreds of Whitten dismissals which have occurred. Now, however, those holding discharge orders are in a precarious position, and not just if the State handed them a specious complaint one time, but if they ever received a mixed message that their orders do not mean what they say. The State, however, is the last entity which should be afforded the power to unscript a court order without the court itself. Therefore, the question becomes, what other entities are afforded that same perilous power as a result of the government being given it?

Dated: March 6, 2009

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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2323

State of Minnesota,
Plaintiff,

vs.

Harold Glenn Linville, Jr.,
Defendant.

Filed September 2, 2008
Certified question answered in the affirmative
Harten, Judge*

Dakota County District Court
File No. K9-07-1667

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

James C. Backstrom, Dakota County Attorney, Nicole E. Nee, Assistant County Attorney, 1560 West Highway 55, Hastings, MN 55033 (for plaintiff)

Rodd A. Tschida, 401 North Third Street, Suite 415, Minneapolis, MN 55401 (for defendant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

If an individual arraigned on a charge of possession of firearms by an ineligible person moves successfully for dismissal of that charge under *Whitten* v. *State,* 690 N.W.2d 561 (Minn. App. 2005), the arraignment on the first charge precludes the dismissal of any subsequent charges of possession of firearms by an ineligible person under *Whitten.*

OPINION

HARTEN, Judge

The district court, after denying a motion to dismiss a charge of possession of firearms by an ineligible person, certified to this court the following question:

> If the State and Defendant agree that *Whitten v. State,* 690 N.W.2d 561 (Minn. App. 2005) (conviction for felon-in-possession vacated where defendant's previous discharge order restored defendant to all civil rights and left blank the prohibition against firearm possession) directly applies to warrant a dismissal of a charge of felon in possession of a firearm, does the fact of arraignment in the dismissed case then negate the application of *Whitten* in a future case on the same charge?

We answer the certified question in the affirmative and affirm the district court's denial of the motion to dismiss.

FACTS

In September 2003, defendant Harold Linville was convicted of felony unauthorized use of a motor vehicle, a crime of violence within the meaning of Minn. Stat. § 624.712, subd. 5 (2002). His conviction made him ineligible to possess firearms. Minn. Stat. § 624313, subd. 1(b) (2002). He was placed on probation, from which he was discharged in June 2006. On the discharge order, the box preceding the statement "[y]ou are not entitled to ship, transport, possess or receive a firearm until 10 years have elapsed since you have been restored to civil rights and during that time you are not to have been convicted of any other crime of violence" was erroneously left blank.

In December 2006, appellant was charged with, among other things, possession of a firearm by an ineligible person (the December charge). He was arraigned and given a copy of the complaint He posted a bond and was released; his release order had an "X" in the blank preceding the statement, "The Defendant shall not possess any weapons/ ammo/firearms."

Defendant moved successfully to dismiss the December charge, relying on an unpublished and non-precedential decision of this court, *State v. Amos,* No. CX-03-42, 2003 WL 22040016 (Minn. App. 2 Sept. 2003) (reversing and vacating conviction for possession of firearms of individual whose notice of discharge erroneously informed him he was restored to all civil rights and did not inform him that he was prohibited from possessing firearms).

In May 2007, defendant was again charged with, among other things, possession of a firearm by an ineligible person (the May charge); he was again

arraigned and given a copy of the complaint.

Defendant moved to dismiss the May charge on the same ground as the December charge, i.e., the fact that, on the discharge order, the box preceding the statement that he was ineligible to possess firearms had been left blank, relying this time on *Whitten v. State,* 690 N.W.2d 561, 565 (Minn. App. 2005) (reversing conviction of possession of firearms because discharge order had no check before statement prohibiting possession of firearms). The district court denied defendant's motion to dismiss the May charge, reasoning that "while [defendant] had an argument initially [i.e., for the December charge] that he had no notice that he was not to possess firearms due to the defective discharge notice, once he was arraigned on [the December charge], appropriate notice was given."

Defendant challenged the denial of his motion to dismiss and moved to certify to this court the question of the repeated application of *Whitten.*

ISSUE

If an individual previously arraigned on a charge of possession of firearms by an ineligible person has moved successfully for dismissal of that charge under *Whitten v. State,* 690 N.W.2d 561 (Minn. App. 2005), does that arraignment preclude the dismissal under *Whitten* of a subsequent charge of possession of firearms by an ineligible person?

ANALYSIS

"The failure of the court to provide this information [ineligibility of individual convicted of crime of violence to possess firearms] to a defendant does not affect the applicability of the . . . prohibition

or the felony penalty to that defendant." Minn. Stat. § 624.713, subd. 3(a) (2006). The statute applies to a defendant whose discharge order did not notify him of the prohibition because his crime was not classified as a crime of violence until after his discharge. *State v. Grillo,* 661 N.W.2d 641, 645 (Minn. App. 2003), *review denied* (Minn. 5 Aug. 2008). This holding is based on "a long-held principle in Minnesota that ignorance of the law is not a defense when it would have been possible, had [the defendant] made the effort to do so, to learn of the existence of the prohibition." *Id.*

But *Whitten v. State,* 690 N.W.2d 561, 566 (Minn. App. 2005), reversed a conviction of possession of firearms by an ineligible person because the defendant's discharge order did not have a check in the blank preceding the statement of ineligibility to possess a firearm. *Whitten* distinguished *Grillo* on the ground that, in *Grillo,* the state merely "failed to communicate the prohibition," whereas in *Whitten,* the state "told [the defendant] he would be eligible to own a firearm." *Id.*

Thus, the *Whitten* and *Grillo* holdings are reconciled on the basis of what the state communicated to the defendant concerning his eligibility to possess firearms. Here, the state clearly communicated to appellant that he was ineligible to possess firearms in December 2006 when it served him with a complaint and arraigned him because he had firearms in his possession. At no point after that did the state communicate to appellant that he was eligible to possess firearms. The district court correctly found that the period during which appellant could argue, under *Whitten,* that he had not been informed of his ineligibility expired when he

was arraigned on the charge of illegal possession of firearms.

DECISION

We affirm the denial of defendant's motion to dismiss and answer the certified question in the affirmative: arraignment on a charge of ineligible possession of a firearm precludes subsequent application of the *Whitten* defense.

Certified question answered in the affirmative.

Dated: 25 AUGUST 2008

s/_____
James C. Harten, Judge

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota, Court File No. K9-07-1667
Plaintiff,

vs. **OMNIBUS ORDER**

Harold Glenn Linville II,
Defendant.

The above-entitled matter came on before the undersigned for a contested motion hearing on August 8, 2007. Nicole Nee, Esq., appeared on behalf of the State, and Jason Bauer, Esq. appeared for and with the Defendant. The parties requested additional time for briefing the issue and the record was considered closed and submitted as of August 15, 2007.

Now, therefore, based upon all the files, records and proceedings herein, the Court makes the following:

ORDER

1. That Defendant's motion to dismiss is denied, for the reasons more fully set forth in the accompanying Memorandum.

2. That the parties contact central assignment to obtain a pre-trial or trial date.

BY THE COURT:

DATED: 8-30-07 s/
Martha M. Simonett
Judge of District Court

MEMORANDUM

On September 9, 2003, Defendant was convicted in Dakota County District Court of theft of a motor vehicle, an offense defined under Minnesota law as a crime of "violence." In 2006, he was discharged from probation. Both parties agree that the Order discharging him from probation was defective in that it stated that the defendant was restored to "all civil rights" and failed to advise him that he was prohibited from possessing firearms for 10 years after discharge. (See Order discharging Defendant from probation in Court File No. 194(3-03-2112.)

On December 6, 2006, Defendant was charged with a felony Possession of a Firearm by an Ineligible Person and a second Count of Receiving Stolen Property for an incident occurring on December 4, 2006. He was arraigned by Judge Sutherland regarding these charges and bail was set with conditions of release including no possession of firearms or weapons. On May 9, 2007, defense counsel in K6-06-3995 filed a Memorandum providing a copy of the defective discharge and case law indicating that it is a violation of due process to fail to notify the Defendant that he is prohibited from possessing firearms and then prosecuting him for it. On July 24, 2007, Count I was dismissed in this matter. The Defendant pleaded guilty to Count II on July 24, 2007, and sentencing is scheduled for September 11, 2007.

The instant case arises out of an incident which occurred on May 15, 2007. Defendant was arrested following the discovery of weapons in his possession. The officers at that time inquired regarding the conditions of his release on K6-06-3995,

and were advised that court records showed that Defendant was to have no possession of weapons. Accordingly, he was placed under arrest and ultimately charged with Possession of a Pistol by an Ineligible Person.

Defendant relies primarily on Whitten v. State, 690 N.W.2d 561 (Minn. Ct. App. 2005), which holds that it is a violation of due process for the government to mislead individuals as to their legal obligations. The Court notes that the due process issue in Whitten was that of notice to the Defendant concerning his legal obligations. Here, the Court agrees with the State that while Defendant had an argument initially in K6-06-3995, that he had no notice that he was not to possess firearms due to the defective discharge notice, once he was arraigned on K6-06-3995, appropriate notice was given and his claim of a violation of due process fails.

M.M.S

STATE OF MINNESOTA
IN SUPREME COURT

A07-2323

State of Minnesota,

Respondent,

vs.

Harold Glenn Linville, Jr.,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Harold Glenn Linville, Jr., for further review be, and the same is, denied.

Dated: November 18, 2008

BY THE COURT:

s/ _____
Eric J. Magnuson
Chief Justice

STATE OF MINNESOTA **JUDGMENT**

State of Minnesota, Plaintiff, vs. Harold Glenn Linville, Jr., Defendant

Court of Appeals
Appellate Court # A07-2323
Trial Court # K9-07-1667

Pursuant to a decision of Court of Appeals duly made and entered, it is determined and adjudged that the certified question from the Dakota County District Court, Hastings Criminal Division is answered in the affirmative in accordance with the opinion and judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

Dated and signed: December 8, 2008

FOR THE COURT

Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: s/_____
Assistant Clerk